No. 91-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FERRIS J. ALEXANDER, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE AMERICAN LIBRARY ASSOCIATION, FREEDOM TO READ FOUNDATION, AND ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF OF AMICI CURIAE AMERICAN LIBRARY ASSOCIATION, FREEDOM TO READ FOUNDATION, AND ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICI

The American Library Association ("ALA"), founded in 1876, is a nonprofit, educational organization committed to the preservation of the library as a resource indispensable to the intellectual, cultural, and educational welfare of the nation. ALA is the oldest and largest library association in the world and is the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 public, academic, specialty and school libraries and more than 52,500 individuals, primarily librarians.

The Freedom to Read Foundation ("Foundation") is a nonprofit organization established in 1969 by ALA to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and to set legal precedent for the freedom to read of all citizens.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its over two hundred members include most of the major commercial book publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history and fiction.

American libraries, library collections, their users, major publishers, and the readers of their works have

not been the initial victims of obscenity-based RICO forfeiture. Nor would they necessarily be the first victims of the dangerous changes in this Court's First Amendment jurisprudence that would be required to uphold such forfeiture. *But no mistake should be made:* if in this case this Court were to uphold the forfeiture of constitutionally protected expressive materials and other means of *future* speech as a response to the commission of speech crimes, the Court would encroach profoundly on expressive liberty in this country. Libraries and their users, publishers and their readers—together with all Americans—would be the ultimate victims of such a holding.

Libraries and publishers are both essential to and dependent upon the thriving, unrestrained American marketplace of ideas that is a major source of energy and light for the world. Libraries and publishers make available to *all* Americans the essential means for their participation in that marketplace: a realm of information, ideas, and images where the *reader* is sovereign, empowered to seek, contemplate, accept, or reject material subject only to limitations on resources and the reader's own values and intellect. But just as they enrich and enable the marketplace of ideas, libraries and publishers also *depend* on the vitality of that marketplace. They can make available only that which is available to them, that which they are free to make available, and that which their patrons are free to see. The First Amendment—and its protection of *all* participants in the marketplace of ideas—is thus the essential prerequisite to fulfillment of libraries' and publishers' vital social function.

Although on its face this case deals only with the fate of one "adult" business in Minnesota, the outcome could radically diminish the protection afforded expression in this country, with a corresponding diminution in libraries' and publishers' power to offer readers sovereignty over information, ideas and images. *Amici* hope this brief will demonstrate that much more is at stake than the

simple fate of Mr. Alexander and his inventory of presumptively protected expressive materials, which the United States government, under the auspices of RICO, has now destroyed.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an effort to disable the petitioner from committing speech crimes in the future, the government in this case is claiming the power to *confiscate, crush and burn* literally thousands of presumptively protected expressive materials and to confiscate virtually all other means of future expression as a "punishment" for past speech crimes. This claim raises First Amendment issues of surpassing importance, specifically preserved and foreshadowed by this Court in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916 (1989).

At stake is the critical presumption, preserved throughout this Court's prior restraint jurisprudence, that speech must be presumed to be protected until duly adjudicated otherwise. *E.g., Roaden v. Kentucky*, 413 U.S. 496 (1973). RICO requires forfeiture of all assets associated with prior obscenity offenses to ensure that the defendant will commit no such offenses in the future. To permit suppression of virtually all of the defendant's future speech in order to prevent some that might prove to be obscene would utterly eviscerate the fundamental premise that future speech is "presumptively protected." Put simply, the forfeiture order blatantly violates the prohibition against prior restraints—"the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

The government's formalistic defenses threaten yet another bedrock principle, one that time and again has guided the free-speech decisions of this Court: in First Amendment cases, and particularly prior restraint cases, "the court has regard *to substance and not to mere*

matters of form, and . . . in accordance with familiar principles, . . . statute[s] must be tested by [their] operation and effect." *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (emphasis added). This doctrine of preventing the *substance* of censorship, whatever its *form*, has preserved the health of the system of free expression even when government officials have sought to pour the old poison of censorship into new vials. This rule ensures that the First Amendment will be as resourceful in protecting expression as government officials may prove to be in attempting to censor it.

To uphold RICO forfeiture in this case, the government asks this Court to abandon this critical First Amendment principle. Government plainly may *not* use a *civil* action to disable *future* speech in order to prevent recurrence of a past speech violation. *E.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). The forfeiture at issue here can therefore be upheld only on the radical premise that government may use a *criminal* action to achieve this forbidden purpose. *See Alexander v. Thornburgh*, 943 F.2d 825, 834 (8th Cir. 1991) (relying on "the substantial difference between prior restraints and criminal penalties"). Such a distinction between civil remedies and criminal punishments would inject a crippling formalism into this Court's First Amendment jurisprudence that would permit—not only here, but in other cases as well—the evasion of crucial First Amendment protections, to the great detriment of the justly celebrated American marketplace of ideas. This Court should look through the form to the substance, and set aside the forfeiture as an unconstitutional prior restraint. (Point I).

Moreover, the application of RICO's broad forfeiture provisions to speech crimes such as obscenity creates an intolerable risk of *intentional* censorship of protected speech. RICO confers on prosecutors the discretion to decide whether to add a RICO count to an obscenity indictment, and thereby trigger RICO forfeiture of the

entire speech enterprise. Consequently, RICO gives prosecutors a unique and potent tool with which to *seek* suppression of a particular defendant's *protected* speech. Any such motive for invocation of RICO would be unlawful, *see United States v. PHE, Inc.*, 965 F.2d 848, 849 (10th Cir. 1992); *PHE, Inc. v. U.S. Dep't. of Justice*, 743 F. Supp. 15, 21-23 (D.D.C. 1990) (collecting cases), but to establish that motive would, in most cases, be literally impossible. In the absence of any meaningful regulations channeling the exercise of this prosecutorial discretion, RICO forfeiture raises a constitutionally intolerable risk that power will be abused for the intentional purpose of suppressing protected expression. (Point II).

ARGUMENT

I. WHEN BASED UPON PREDICATE ACTS OF OBSCENE SPEECH, RICO FORFEITURE IMPOSES AN UNCONSTITUTIONAL PRIOR RESTRAINT ON EXPRESSION.

A. RICO Forfeiture Revives a Previously Shunned Form of Post-Conviction Remedy That Bears No Resemblance to Traditional Forms of "Punishment" and, As Applied to Speech Crimes, Poses Grave Threats to First Amendment Freedoms.

RICO established "new weapons of unprecedented scope." *Russello v. United States*, 464 U.S. 16, 26 (1983). Such measures were thought necessary "for an assault upon organized crime and its economic roots." *Id.* RICO's central weapon in this "assault" was its mandatory criminal forfeiture provision.[1] Prior to RICO's enactment in

[1] The statute *requires* forfeiture of not only any interest the defendant has indirectly or directly acquired or maintained in violation of the Act and all proceeds therefrom, but also any interest in the enterprise involved in the RICO violation or in "any enterprise" which affords him a "source of influence" over the criminal enterprise (his economic base). 18 U.S.C. § 1963(a).

1970, *in personam* criminal forfeiture—forfeiture of an individual's estate as a result of his criminal conviction—was anathema in American jurisprudence, and was affirmatively prohibited.[2]

Criminal forfeitures *in personam* arose in medieval England, where, following a felony conviction, the entire estate of the felon was confiscated and any inheritance from the felon was prohibited.[3] In the Magna Carta, forfeiture on the ground of commission of a felony was sharply curtailed, but survived to an extent in the English common law.[4] There is some evidence that criminal forfeiture was occasionally used in a few early colonies, but it quickly fell into disrepute and did not long survive in the New World. Calling upon the English experience, the Framers of the Constitution limited criminal forfeiture for treason to the life estate of the defendant's property.[5] Moreover, in 1790, the First Congress—the same Congress that later adopted the Bill of

[2] Unlike *in rem* forfeiture, which depends upon the character of the property rather than its owner's crime, and is applied against contraband or articles put to unlawful use, 18 U.S.C. § 1963 operates against the person of the defendant as a consequence of criminal conviction and includes forfeiture of a portion or all of his estate. *In rem* forfeitures are civil proceedings separate from any criminal case, and the property to be forfeited must be clearly identifiable and located within the court's jurisdiction. In contrast, *in personam* actions can reach assets outside the court's jurisdiction, as well as assets (such as money) that can no longer be specifically traced to the criminal activity. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (Story, J.) (describing distinction between *in rem* and *in personam* forfeitures).

[3] *See* Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 Am. Crim. L. Rev. 379, 381 (1980) (hereinafter "Taylor").

[4] *See id.*

[5] "The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. Const. art. III, § 3.

Rights—abolished forfeiture of estate and corruption of the blood for any federal crime.[6] *In personam* forfeiture of estate for a felony conviction was deemed "an unfair, undue, and unusual punishment."[7] *See United States v. Martino*, 681 F.2d 952, 962 (5th Cir. 1982) (Polito, J., dissenting) ("Just as nature abhors a vacuum, historically our society has abhorred forfeitures."), *aff'd* 464 U.S. 16 (1983). It did not reappear in American jurisprudence until 180 years later, when Congress enacted RICO.[8]

In personam forfeiture as revived in RICO was not only unpredecented in U.S. law, but also—in the words of the statute's principal sponsors—"[d]rastic [and] extraordinary." *Russello*, 464 U.S. at 26-27 (quoting Sens. McClellan and Hruska). Critically for present purposes, Congress declared that "[i]t is the purpose of this Act to seek the *eradication* of organized crime." *Id.* at 27 (emphasis added). The forfeiture provision, in particular, was intended not simply to *deter* unlawful conduct—as the more traditional penalties of imprisonment and fines were already intended to do—but to "'*incapacitate*, and . . . *directly to remove* the corrupting influence from the channels of commerce.'" *Id.* at 28 (emphasis added)

[6] "*Provided always, and be it enacted*, That, no conviction or judgment for any of the offenses aforesaid, shall work corruption of the blood, or any forfeiture of estate." Act of Apr. 30, 1790, § 24, 1 Stat. 112 (1790). The statute is now codified as 18 U.S.C. § 3563.

[7] Taylor, *supra* n.3, at 383.

[8] The only prior example of *in personam* forfeiture in American history was the Confiscation Act of 1862, which allowed forfeiture of property that belonged to leaders of the Southern secessionist States. This Court later held that Act unconstitutional. *See Bigelow v. Forrest*, 76 U.S. 339, 352-53 (1870). The 91st Congress recognized that, in enacting RICO criminal forfeiture, it was reviving a long dormant remedy. Indeed, Congress acknowledged that it was partially repealing the 1790 Act. *See* S. Rep. 91-617 at 79-80; 116 Cong. Rec. 35205, 35208 (Reps. Mikva, Ryan); 1970 U.S. Code Cong. & Admin. News 4083-84.

(quoting Sen. McClellan). As Senator McClellan made plain, RICO forfeiture was specifically intended to "provide *a means of wholesale removal*" of offending enterprises and "*prevention of their return.*" 116 Cong. Rec. 18939 (1970) (emphasis added). Congress believed that neither *in rem* forfeiture nor the traditional criminal penalties of imprisonment and fines were sufficient to achieve the "drastic" prophylactic objective of irrevocably *preventing* the enterprise from again violating the "racketeering" law. *United States* v. *Turkette*, 452 U.S. 576, 589 (1981).

As originally enacted in 1970, RICO targeted the illegal activities of organized crime and did not include obscenity or other speech crimes as predicate offenses. Thus, even with its unprecedented and unusually severe remedies, RICO did not pose First Amendment dangers. In 1984, however, apparently without any consideration of the First Amendment implications, Congress adopted Senator Jesse Helms' proposal[9] and "inject[ed] obscenity offenses into a statutory scheme designed to curtail an entirely different kind of antisocial conduct." *Fort Wayne Books*, 109 S. Ct. at 932 (Stevens, J., concurring and dissenting) (describing effect of analogous Indiana RICO provision). The goal was clear: *preventing* entities convicted of obscenity violations from ever again uttering obscene speech.

Extending the reach of this radical weapon to speech crimes has placed a dangerous weapon for censorship in the hands of federal officials. Since the amendment, a federal Commission on Pornography has advocated the use of RICO forfeiture to "literally put . . . out of business" publishers, booksellers, and distributors of sexually oriented expressive material. Attorney General's Comm'n on Pornography, 1 Final Report 464 (1986). Forfeiture, that Commission argued, should be "used to uproot the capital of pornography producers and distributors . . .

[9] Act of Oct. 12, 1974, Pub. L. 98-473, 98 Stat. 2143.

[and] substantially handicap these businesses." *Id.* at 498. The Commission urged that "the stringent forfeiture provisions under RICO" be used to "eliminate" the publishers and distributors of materials which the Commission disapproved—despite the fact that the speech suppressed thereby would never have been adjudicated obscene. *Id.* at 519.

B. RICO Forfeiture of Presumptively Protected Expressive Materials and the Means of Future Speech, Based on Past Obscenity Violations, Is a Classic Prior Restraint.

The facts of this case dramatically illustrate the threat to First Amendment values posed by the government's use of RICO forfeiture to regulate expression. Invoking the broad "source of influence" provision, 18 U.S.C. § 1963(a)(2), the court ordered forfeiture of petitioner's chain of thirteen retail bookstores and video stores; petitioner's wholesale media distribution business; and all the assets associated with those expressive businesses: numerous parcels of real estate, bank accounts, currency, and vehicles, and over one hundred thousand books, magazines, and videos, all with a value in the millions of dollars. *Alexander v. Thornburgh*, 943 F.2d at 829. *The government confiscated, and has already destroyed by burning and crushing, petitioner's entire inventory of presumptively constitutionally protected expressive materials, based solely on a finding that seven items (four magazines and three videos) were found to be obscene.*[10] Notably, among the materials destroyed in the name of preventing future obscenity violations were all copies of five items the government had indicated, but the jury considered and *declined* to convict. As a result, petitioner can never distribute the presumptively protected books, periodicals, and videos forfeited, and has no realistic ability to acquire other materials to sell through those

[10] Those obscenity violations served as the sole basis for petitioner's RICO convictions. *Alexander* v. *Thornburgh*, 943 F.2d at 829.

or other outlets. Consistent with RICO's design, the government has quite deliberately "uprooted" and "eradicated" petitioner's expressive business and his ability to continue to distribute expressive materials.

Such incapacitation of an offending business might be a constitutional means to prevent recurrence of a *non*-speech offense such as gambling or drug trafficking. But the seizure and destruction of presumptively protected expressive materials and the instrumentalities of speech, in an effort to prevent future *obscenity* violations, is a classic prior restraint prohibited by the First Amendment.[11] "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). Once a specific expressive act (*e.g.*, the sale of a specific book or videotape) has been found constitutionally unprotected, the government may impose an appropriate punishment.[12] But even when there has been a judicial determination that *past* expression was unprotected, *future* expressive activities (*e.g.*, the sale of *different* books, magazines or videotapes) remain presumptively protected under the First Amendment. *See, e.g., Fort Wayne Books*, 109 S. Ct. at 921, 929. Except in extraordinary circumstances not applicable here, government may not restrain specific future speech absent a prior, judicial determination that *that* speech is not constitutionally protected.[13] The First Amendment thus precludes government from responding to past unprotected expression by preventing presumptively protected future speech on the theory that it, too, may prove to be unprotected.

[11] As Justice Stevens explained in *Fort Wayne Books*:

> [T]here is a difference of constitutional dimension between an enterprise that is engaged in the business of selling and exhibiting books, magazines, and videotapes and one that is engaged in another commercial activity, lawful or unlawful. A bookstore receiving revenue from sales of obscene books is not the same as a hardware store or pizza parlor funded by loan-sharking proceeds. The presumptive First Amendment protection accorded the former does not apply either to the predicate offense or to the business use in the latter.

109 S.Ct. at 939 (concurring and dissenting).

[12] Even if RICO forfeiture's sole purpose were to "depriv[e] criminals of the profits of their crimes," it would not remove the provision from First Amendment scrutiny. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S.Ct. 501, 510 (1991). Nevertheless, the government may order forfeiture of the items found obscene in the community in which the finding was made, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and presumably may order forfeiture of the proceeds *directly* attributable to the unprotected transactions. But RICO has far more ambitious and "far-reaching" objectives than seizure of duly adjudicated contraband or disgorgment of illegal profits. *Russello v. United States*, 464 U.S. at 27. The materials proved to be obscene and the profits therefrom almost invariably constitute a minute percentage of the materials and assets forfeited under RICO, as in the present case. The court below ordered forfeiture of millions of dollars worth of corporate assets—including thousands of books, periodicals and videos—based on a finding that petitioner had sold seven items of unprotected expression. The obvious and intended consequence of such massive forfeiture was not mere disgorgment of ill-gotten gains, but achievement of RICO's broader purpose of exterminating the enterprise by confiscating its entire economic base.

[13] The Supreme Court has repeatedly explained that underlying this prior restraint doctrine "is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Vance*, 445 U.S. at 316, n.13, quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975) (emphasis in original).

issues. 283 U.S. at 706.[14] The Supreme Court assumed for purposes of decision that under the First and Fourteenth Amendments the State could impose criminal punishment for the issues that had been found unlawful. *Id.* at 715. *Nonetheless, the Supreme Court held the injunction unconstitutional as an impermissible prior restraint against future publication.*

Near holds that it is unconstitutional "to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (describing *Near*). As the Eleventh Circuit has observed, "in *Near* the Supreme Court condemned prior restraints prohibiting future expression that may fall within the purview of the First Amendment where such restraint is based only on a finding of unprotected present conduct." *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551 (11th Cir. 1983) (mem.) (affirming on the basis of district court's opinion). Such a restraint on future speech is "'the essence of censorship.'" *Kingsley Books*, 354 U.S. at 445, quoting *Near*, 283 U.S. at 713. *Accord Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-419 (1971); *Vance v. Universal Amusement Co.*, 587 F.2d 159, 166 (5th Cir. 1978) (*en banc*), *aff'd* 445 U.S. 308 (1980) (*per curiam*).[15]

[14] Minnesota's nuisance abatement statute applied to obscenity as well as to "malicious, scandalous and defamatory" publications. 283 U.S. at 702.

[15] This Court's decision in *Vance*, among numerous other decisions, demonstrates clearly that the government is wrong in relying upon the Fourth Circuit's holding that prior restraint doctrine is inapplicable to any case concerning obscenity. *See* Opp. Cert. at 7, quoting *United States v. Pryba*, 900 F.2d 748, 754-755 (4th Cir.), *cert. denied*, 111 S.Ct. 305 (1990). Past obscenity violations are no more a valid basis for imposing a prior restraint than past libels, which were at issue in *Near*. *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990); *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Marcus v. Search Warrants*, 367 U.S. 717 (1961). Thus forfeiture of an entire broadcasting business or newspaper would be no more lawful as a consequence of an obscenity conviction than of a libel conviction.

Numerous courts, following *Near* and *Vance*, have struck down as invalid prior restraints closure and "padlocking" remedies imposed to shut down businesses that committed prior obscenity offenses. *E.g., People v. Sequoia Books, Inc.*, 127 Ill.2d 271, 537 N.E.2d 302 (1989), *cert. denied*, 110 S. Ct. 835 (1990); *Minot v. Central Ave. News Inc.*, 308 N.W.2d 851 (N.D.), *appeal dismissed*, 454 U.S. 1117 (1981); *Gulf States Theatres of Inc. v. Richardson*, 287 So.2d 480, 490-492 (La. 1973).

[16] The court of appeals relied in part on evidence submitted by the government in the forfeiture proceeding related to numerous other items in petitioner's inventory. *Alexander v. Thornburgh*, 943 F.2d at 829, 833. Plainly, the court of appeals *itself* viewed the goals of the order as preventing dissemination of these *other* items. But these items were neither the subject of the indictment, nor found obscene by the jury. Indeed, the district court admitted that it had made no such determination. Cert. Petn. App. 155. To paraphrase one district court: "To assume that the unindicted [magazines and] video tapes are obscene would be as improper as finding that all [twelve] of the indicted [magazines and] videotapes are obscene, despite the fact that the jury did not so find. The Government's attempt to transform a jury's finding that [seven items] are obscene into a judicial determination that the Defendant[] operate[d] an obscenity 'empire' . . . constitutes impermissible bootstrapping." *United States v. California Publishers Liquidating Corp.*, 778 F. Supp. 1377, 1388-89 (N.D. Tex. 1991), *appeal pending*.

That is precisely the vice of the court's forfeiture order here. Relying on isolated findings of past unprotected expression, the Court imposed a forfeiture order designed to disable petitioner from engaging in unprotected expression in the future, by suppressing massive quantities of presumptively protected future expression. Without *any* determination of obscenity—indeed, with some destroyed items having been found *not* to be obscene—the thousands of presumptively constitutional books, periodicals, and videos in petitioner's inventory have been permanently removed from circulation by the most final restraints possible.[16] And petitioner has been disabled from acquiring or disseminating additional expressive materials. As in *Vance*, "'the state made the mistake of pro-

hibiting future [expressive] conduct after a finding of undesirable present conduct.'" 445 U.S. at 331 n.3 (quoting three-judge court).

The forfeiture order—at variance with the fundamental meaning of the First Amendment—was entirely consistent with the "far-reaching" objective of RICO, namely prevention of future violations similar to those of the past by exterminating the offending enterprise once and for all, and preventing its reappearance in another form. *Russello v. United States*, 464 U.S. at 27. As the district court itself recognized in issuing the order, "Congress made clear its intent: a RICO enterprise is to be dismantled, root and branch." Cert. Petn. App. 159. RICO forfeiture was intended to "'*eradicat*[*e*] organized crime,'" *Turkette*, 452 U.S. at 589 (quoting the preface to RICO) (emphasis added), and "'*incapacitate*, and . . . directly to remove the corrupting influence from the channels of commerce,'" *Russello*, 464 U.S. at 27-28 (quoting 116 Cong. Rec. 18955, remarks of Sen. McClellan) (emphasis added). This concept of eradication and incapacitation operates prospectively. As this Court held in *Turkette*, RICO's enhanced sanctions and new remedies are "preventive." 452 U.S. at 593 (rejecting reading of RICO forfeiture that "would ignore the preventive function of the statute"). RICO forfeiture is specifically designed to *prevent* the defendant from engaging in the future in those "racketeering" offenses in which it had engaged in the past.[17]

[17] This Court has concluded that Congress included these new forfeiture provisions to break the economic power of organized crime. *Russello*, 464 U.S. at 22. *See* S.Rep. No. 91-617, 79 (1969) ("What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself."); 116 Cong. Rec. 35193 (Rep. Poff, manager of the bill in the House) (same); *id.* at 819 (Sen. Scott) ("purpose is to eradicate organized crime in the United States"); *id.* at 35199 (Rep. Rodino) ("a truly full-scale commitment to destroy the insidious power of organized crime groups"); *id.* at 35300 (Rep. Mayne) (organized crime "must be sternly and irrevocably eradicated"); McClellan, *The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law 55, 141 (1970) (explaining that RICO forfeiture "attacks the problem by providing a means of wholesale removal of organized crime . . . [and] *prevention of their return*") (emphasis added); S.Rep. No. 91-617, at 80 (forfeiture would "remove the leaders of organized crime from their sources of economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence.").

As applied to obscenity offenses, RICO's prophylactic purpose, design, and operation are chillingly effective: RICO prevents a speech enterprise—a bookstore, theater, etc.—from committing further obscenity violations *by preventing it from speaking at all.* This purpose and effect was expressly recognized in the report of the Attorney General's Commission on Pornography; the Commission *urged* prosecutors to use forfeiture to "literally put many pornographers *out of business.*" 1 Final Report 464 (emphasis added). The Commission observed that RICO "provides an effective means to substantially eliminate obscenity businesses." *Id.* at 498 (emphasis added). *See also id.* at 433, 465, 472, 497 (recommending that governments enact statutes authorizing forfeitures even if two predicate offenses cannot be proved, in order to destroy sexually related businesses based upon a single obscenity conviction).

This Court, and Justices Stevens and Scalia in individual opinions, have acknowledged the obvious and troubling prophylactic design of obscenity-based RICO forfeiture. Writing for the Court in *Fort Wayne Books*, Justice White observed that '*[i]t is incontestable that these [RICO] proceedings were begun to put an end to the sale of obscenity at the three bookstores named in the complaint.*" 109 S.Ct. at 929 (emphasis added). Writing separately in *Fort Wayne Books*, Justice Stevens stated that the design and effect of the analogous Indiana RICO forfeiture scheme was "extermination through elimina-

tion of the very establishments where sexually explicit speech is disseminated." *Id.* at 939. In *FW/PBS, Inc. v. City of Dallas*, Justice Scalia similarly recognized that RICO penalties are designed to "eliminat[e] the perceived evil [of] the very existence of sexually oriented businesses anywhere in the community that does not want them." 110 S.Ct. at 619 (Scalia, J., concurring and dissenting). The suppressive goal of the forfeiture at issue *here* is obvious from the government's own actions: after confiscating petitioner's inventory of presumptively protected materials, the government burned and crushed them.

This disabling, preventive purpose of RICO forfeiture distinguishes it, for First Amendment purposes, from traditional criminal sanctions such as fines and imprisonment. Imprisonment and fines are imposed for violation of numerous criminal laws, including obscenity, to accomplish several well-recognized purposes, such as deterrence and rehabilitation, that are wholly unrelated to suppressing speech. Any restraint such traditional sanctions might impose on expression is therefore incidental to their principal and intended objectives. But, as Congress recognized, RICO forfeiture, in sharp contrast, is *designed and intended* to go beyond traditional criminal penalties, and to extirpate an offending speech enterprise and its potential for further unlawful speech. The restraints imposed by RICO forfeiture are neither incidental nor limited. Indeed, it is precisely the power of *in personam* forfeiture to disable criminals from continuing their "pattern" of prior crimes that distinguished it from those traditional criminal penalties and commended it to Congress for inclusion in RICO. See supra at 5-8.

The RICO provisions at issue here are strikingly similar to the statutory scheme rejected by this Court in *Near*. In *Near*, the Minnesota legislature had determined that traditional criminal penalties under "penal statutes for libel [and obscenity] do not result in 'efficient repression or suppression' " of libelous or obscene speech. 283 U.S. at 711. The injunctive "abatement"

remedy at issue in *Near* was the legislative response. *Id.* at 717. The similar reason for enactment of RICO was Congress' determination that "racketeering" activities (later including obscenity) could not be sufficiently repressed or suppressed by traditional criminal penalties. *Turkette*, 452 U.S. at 589. *In personam* forfeiture was the legislative response.

The predicate for restraining petitioner's future expression under RICO is the same as the predicate for the injunction struck down in *Near*—prior violation of criminal speech laws. The restraint imposed here by the district court, however, is in two ways far more inimical to First Amendment values. *First*, in this case, the court ordered *seizure* and *forfeiture* of expressive materials, for the purpose of their destruction. Physical seizure of expressive materials is "more repressive than an injunction preventing further sale," such as was at issue in *Near*. *A Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964) (plurality opn.). As this Court ruled in *Marcus v. Search Warrant of Property*, seizure is "an effective restraint—indeed the *most* effective restraint possible . . . because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." 367 U.S. at 736 (emphasis added). The crushing and burning of presumptively protected materials in this case has maximized the suppressive effect of seizure.

Second, the injunction at issue in *Near* restrained defendants from publishing 'a malicious, scandalous, or defamatory newspaper, as defined by law." 283 U.S. at 706. Even though this injunction permitted the defendant to publish a newspaper that did *not* contain libelous material, the *Near* Court struck it down because it violated the vitally important presumption that future speech is protected by the First Amendment until proven otherwise. *Id.* at 712-13. RICO—and the order at issue—go *much further* in their unlawful scope; to *ensure* no recurrence of the speech crime, they authorize the seizure and forfeiture of *all* expressive materials owned by the

speech enterprise, not just those that have been proved unprotected, and virtually all means of obtaining and selling *other* expressive materials.[18] As a state supreme court has observed of an analogous measure:

> This provision has the effect of sledgehammering the printing press, the camera, the projectors, all the tools of expression in every medium, so that there can be no future expression at all for one who transgresses by crossing the line from free speech to obscenity . . . . We can envision no more fatal defect of prior restraint . . . .

Gulf States Theatres v. Richardson, 287 So. 2d 480, 491 (La. 1973).[19]

C. The Formalistic Defenses Offered to Justify Obscenity-Based RICO Forfeiture Must Be Rejected.

The court of appeals apparently believed there was some talismanic distinction between prior restraints and

[18] Thus, the remedies authorized by RICO clearly pose the dangers of prior restraints identified by Justice White in his separate opinion in *Vance*, 445 U.S. at 324: "through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected." Indeed, RICO forfeiture makes *certain* that "mistakes" will be made by the thousands; to guarantee no obscenity is ever uttered, it restrains *all* speech by the defendant, whether constitutionally protected or not.

[19] A broad so-called "content neutral" restraint on future speech, triggered by a past speech offense, is just as unlawful as a content-based restraint aimed at future unlawful speech. *Organization for a Better Austin v. Keefe*, 402 U.S. at 418-419 (holding unconstitutional an injunction "operat[ing] . . . to suppress, on the basis of previous publications, distribution of literature 'of any kind'"). The reason a narrow, content-based ban such as that condemned in *Near* is not permitted is that the government cannot presume in advance that future speech will be unprotected. Where, as here, the government bans *all* future speech on the presumption that *some* will be unprotected, its sweeping ban is *a fortiori* unconstitutional, and far more dangerous. *Cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). *See California Publishers Liquidating Corp.*, 778 F. Supp. at 1384 ("to enter an order of forfeiture of materials not found to be obscene would do violence to the First Amendment's protection from prior restraint").

"criminal penalties," and relied upon this Court's decision in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), for that proposition. *Alexander v. Thornburgh*, 943 F.2d at 834. *See also Adult Video Ass'n v. Barr*, 960 F.2d 781, 789 (9th Cir. 1992); *United States v. Pryba*, 900 F.2d 748, 753 (4th Cir.), *cert. denied*, 111 S.Ct. 305 (1990). That formalistic distinction has no place in First Amendment jurisprudence.

Arcara is entirely inapposite. The padlocking order upheld there merely closed a bookstore as a public health measure to prevent continued prostitution and other *nonspeech* activity on the premises. Distinguishing *Near*—where the injunction had been triggered by past libels—the *Arcara* Court emphasized that "the imposition of the closure order" had "nothing to do with any expressive conduct at all." 478 U.S. at 705 n.2. Thus, in the *Arcara* Court's view, the fact that expressive materials were involved had been a fortuity, and the impact on speech activities was only incidental. The Court held that the government may close a bookstore for a year based upon "unlawful conduct *having nothing to do with books or other expressive activity*." *Id.* at 707 (emphasis added). *See id.* at 705 (bookstore may be closed for nonspeech offenses such as prostitution, "Fire Code violations, or health hazards from inadequate sewage treatment"). It was implicit in the Court's analysis, as Justice O'Connor observed, that use of a nuisance statute to "clos[e] down a book store because it sold indecent books . . . would clearly implicate First Amendment concerns." *Id.* at 708 (concurring opn.). The First Amendment constrains government regulation when, as here, "a significant expressive element . . . drew the legal remedy in the first place." *Id.* at 706 (maj. opn.).

Like the restraint in *Near*, and unlike the closure in *Arcara*, the present order restrains future speech based solely upon a finding that the enterprise has engaged in instances of unlawful *speech* in the past. Application of RICO forfeiture in obscenity cases is predicated on *ex-*

pressive rather than nonexpressive activities (*i.e.*, expression "drew the legal remedy," *id.*). Moreover, like the restraint in *Near* and unlike the closure in *Arcara*, the *objective* of the present order is to prevent future speech crimes—*not* future acts of prostitution or other nonspeech offenses. Although an order premised on and directed at preventing nonspeech offenses may not raise First Amendment concerns whatever its incidental effects on speech, forfeiture predicated on a speech crime is based upon the forbidden presumption that future *speech* will be unlawful, the hallmark of a prior restraint. *See People v. Sequoia Books*, 127 Ill.2d 271, 537 N.E.2d 302, 309 (1989), *cert. denied*, 110 S.Ct. 835 (1990). *Cf. Gulf States Theatres*, 287 So.2d at 491 (availability of padlocking and destruction of fixtures as penalty for gambling or prostitution offenses "affords no basis for analogy with the suppression and regulation of speech").[20]

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[20] This crucial distinction undergirds *Arcara itself*, 478 U.S. at 706, and demonstrates the fallacy of the contention that applying prior restraint doctrine in this context would permit criminals to "launder" their illegally obtained profits by investing in bookstores. *See Alexander*, 943 F.2d at 834 (advancing this erroneous argument); *Pryba*, 900 F.2d at 755 (erroneously claiming that prior restraint "reasoning would allow the Columbian drug lords to protect their enormous profits by purchasing the New York Times or the Columbia Broadcasting System"); *Adult Video Ass'n*, 960 F.2d at 790 (making same erroneous argument); Opp. Cert. at 6 (erroneously claiming that "if bookstores, newsstands, publishing houses, and the like were immune from forfeiture, drug lords and other criminals would waste no time in investing in those businesses and insulating their criminal proceeds from seizure"). These dire predictions are specious. Prior restraint doctrine precludes forfeitures designed to disable the defendant from committing future *speech* offenses. *See California Publishers Liquidating Corp.*, 778 F. Supp. at 1393. Under the reasoning of *Arcara*, forfeiture designed to prevent narcotics trafficking and gambling does not implicate prior restraint doctrine because the goal is to restrain commission of nonspeech offenses. *Cf. Fort Wayne Books*, 109 S.Ct. at 939 ("Seldom will First Amendment protections have any relevance to the sanctions that might be invoked against an ordinary commercial establishment.") (Stevens, J., concurring and dissenting).

Nor can the RICO forfeiture imposed in this case be insulated from First Amendment scrutiny by invoking the the label "criminal penalty." The "standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981) (zoning law prohibiting "live entertainment" including nude dancing, subject to strict scrutiny). As this Court recently affirmed in *Fort Wayne Books*, "[a]s far back as the decision in *Near* . . . , this Court has recognized that the way in which a restraint on speech is 'characterized' . . . is of little consequence." 109 S.Ct. at 929. *See Near*, 283 U.S. at 708 (prior restraint doctrine looks "to substance and not to mere matters of form"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 67 ("We are not the first court to look through forms to the substance . . ."). A court assessing whether a governmental action is an unconstitutional prior restraint must "cut through mere details of procedure" and evaluate its "operation and effect" upon free speech. *Near*, 283 U.S. at 708, 713.

An argument similar to this "criminal penalty" argument was made and rejected in *Near*. In dissent, Justice Butler sought to justify the injunction there as merely "prescrib[ing] a remedy" for a proven wrong. 283 U.S. at 735. The dissent argued that the injunction did "not operate as a *previous* restraint on publication within the proper meaning of that phrase" because it restrains "only . . . continuing to do what has been duly adjudged to constitute a nuisance." *Id.* (emphasis in original). Because the decree was imposed to prevent further unprotected expression, Justice Butler argued any claimed "similarity" to a "previous restraint" was "fanciful." *Id.* at 736 (emphasis deleted). Chief Justice Hughes and the majority of the *Near* Court specifically rejected this argument as "inconsistent with the reason that underlies the [First Amendment] privilege." *Id.* at 721; *see id.* at 720. The statute's object, the Court recognized, was "not punishment, in the ordinary sense, but suppression of the

offending newspaper or periodical." *Id.* at 710. As a district court recently concluded: "The First Amendment's safeguards against prior restraint of expression do not vanish merely because a criminal statute is used to silence printing presses." *California Publishers Liquidating Corp.*, 778 F. Supp. at 1393.

To uphold eradication of speech enterprises as "punishment" for engaging in past unprotected expression would destroy prior restraint doctrine, the centerpiece of First Amendment jurisprudence. *Any* restraint on future expression would survive on this theory if imposed after a criminal trial. This Court's rulings in *Near* and *Vance*, for example, could be evaded by the simple expedient of changing the rubric under which the injunctions in those cases were imposed. Indeed, this Court's ruling in *Fort Wayne Books* could similarly be evaded.[21] If the label "criminal punishment" conferred immunity from the First Amendment, legislatures and municipal governments would be free to punish speech-related crimes with "banning orders." An individual convicted of burning his draft card, as in *United States v. O'Brien*, 391 U.S. 367 (1968), or convicted of violating an injunction against street demonstrations, as in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), could be banned from participating in *any* future political demonstrations as "punishment" for the past transgression. Dr. Martin Luther King could have been prohibited from conducting any future civil rights marches as a "penalty" for marching without a permit in Birmingham. Following this

[21] In *Fort Wayne Books*, the pre-trial seizure was based upon past obscenity *convictions* and probable cause to believe a RICO "pattern" and "enterprise" could be proved in the forthcoming RICO trial. 109 S.Ct. at 929. *See also Near*, 283 U.S. at 706 (defendant had committed seditious libel); *Vance*, 445 U.S. at 331 (injunction under challenged law would be based on "showing that obscene films had been exhibited in the past"). Under the "criminal penalty" theory, the *Fort Wayne Books* seizure could have been accomplished by providing *fewer* protections for speech, for example, *by authorizing the seizure as "punishment" for the prior convictions alone*. *Fort Wayne Books* rejects such formalistic evasions of prior restraint doctrine.

reasoning, if a newspaper published one reckless libel, one state secret, or one unfair use of a copyright-protected work, the First Amendment would permit the government to forfeit as a "criminal penalty" not only the printing presses but the entire publishing business. Such results are inconceivable, and the prior restraint imposed in this case is similarly unconstitutional. However the restraint is denominated, and however the determination of prior speech offenses is made, government may not constitutionally impose a far-reaching ban on *future* speech because a defendant has been found to have engaged in impermissible speech activity in the past.

Finally, RICO forfeiture proponents argue that the unprecedented, draconian sanction is not an unconstitutional prior restraint because "petitioner is free to engage in the production and distribution of any First-Amendment protected material after the forfeiture." Opp. Cert. at 7. *See also Adult Video Ass'n v. Barr*, 960 F.2d at 790. This argument ignores reality and misperceives prior restraint doctrine. Like the unconstitutional schemes in *A Quantity of Books* and *Marcus*, the order at issue in this case imposes "the most effective restraint possible" on the dissemination of *particular* materials. All the expressive materials in petitioner's inventory have been seized, forfeited, and destroyed. Petitioner certainly cannot disseminate those presumptively constitutional materials under any circumstances; they have been incinerated. Furthermore, the present order is specifically designed to deprive petitioner of the economic capacity to continue his business or to open a new one—and it has been successful. The patently unconstitutional design, operation and effect of RICO forfeiture in the obscenity context is to prevent virtually *all* of petitioner's future speech to ensure that none is obscene.

II. THE RICO FORFEITURE PROVISIONS VIOLATE THE FIRST AMENDMENT BY CONFERRING UNBRIDLED DISCRETION ON PROSECUTORS, AND POSE AN INTOLERABLE RISK OF SELECTIVE CENSORSHIP OF PROTECTED EXPRESSION.

As discussed above, RICO forfeiture's statutory purpose of preventing future *obscenity* violations is impermissible; even more ominous, however, is RICO forfeiture's potential for improper use to suppress future *protected* expression prosecutors find objectionable. The Justice Department concedes that RICO forfeiture "provides potential for abuse," because prosecutors have unbridled discretion to selectively charge RICO. RICO Manual for Federal Prosecutors, 9-110A.110 at 138. When obscenity provides the predicate offense, the discretionary process of charging RICO "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (internal quotations omitted).[22] Because the purpose and effect of RICO forfeiture in the obscenity context is the dismantling of the entire speech "enterprise," there is a significant danger that prosecutors in many cases will use obscenity-predicated RICO charges to destroy expressive businesses because those prosecutors disapprove of the businesses' protected speech. Such a risk of deliberate suppression of protected speech "the First Amendment will not tolerate." *Fort Wayne Books*, 109 S.Ct. at 939 (Stevens, J., concurring and dissenting).

In this case, the government could have charged petitioner with obscenity violations, 18 U.S.C. §§ 1461-1465, and *not* added obscenity-predicated RICO charges. Indeed, the government frequently indicts on multiple obscenity

[22] Obscenity-based RICO forfeiture thus poses the same threat to First Amendment freedoms that Justice Kennedy feared with regard to explicitly content-based sanctions: that governments "may censor speech whenever they believe there is a compelling justification for doing so." *Simon & Schuster*, 112 S. Ct. at 513 (1991) (concurring opn.).

counts without invoking RICO.[23] Without a RICO conviction, however, the government could not have ensured forfeiture of petitioner's thirteen bookstores and video stores, wholesale distribution business, and all the assets related to those expressive businesses.[24]

No standards meaningfully guide the prosecutorial decision whether to supplement charges on the predicate offenses with RICO charges. The RICO statute itself provides *no* standards guiding this decision. The Department of Justice Handbook is perfectly standardless: RICO charges are appropriate "when[, *inter alia*,] a substantial prosecutive interest will be served" by forfeiture. 9-110.311(D). The RICO Manual for federal prosecutors likewise provides no guidance: RICO charges are proper when "use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct." 9-110A.100 at 139-40.[25]

[23] *E.g., United States v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992); *United States v. Easley*, 942 F.2d 405 (6th Cir. 1991).

[24] Obscenity convictions may entail forfeiture pursuant to 18 U.S.C. § 1467. In *California Publishers Liquidating Corp.*, the court observed that "the RICO forfeiture statute, 18 U.S.C. § 1963, and Section 1467, although both providing for criminal forfeiture, are not at all the same." 778 F.Supp. at 1391-92. (Refusing "to rely on analogies to RICO in its interpretation and application of Section 1467"). Thus, while constitutional problems may inhere in the obscenity forfeiture statute, in its decision issued in October, 1991, the district court in *California Publishers Liquidating Corp.* noted that the government could not identify one case in which a violation of federal obscenity laws alone resulted in forfeiture of an entire business. 778 F. Supp. at 1387 n.10 (refusing to impose such extensive forfeiture under Section 1467).

[25] Given the gross disparities between the value of the materials deemed obscene and the value of the property forfeited in two reported federal RICO obscenity cases, it is difficult to believe this "standard" provides *any* limit on federal prosecutors' discretion. Cert. Petn. App. 154-55 (*Alexander* court in forfeiture proceeding observing that "[p]lainly, there is little chance that the sale of these few videos and magazines [found obscene] could generate such massive income to the enterprise," nearly $9 million, which the court nevertheless ordered forfeit); *Pryba*, 900 F.2d at 753 (uphold-

These are not "narrowly drawn, reasonable and definite standards" containing "objective factors." *Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395, 2402-3 (1992). *See also Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (holding that discretionary authority over future, presumptively protected expression must be guided by "narrowly drawn, reasonable and definite standards"). This Court has made clear that when, as with invocation of RICO, a government official's decision regarding free expression "involves appraisal of facts, the exercise of judgment, and the formation of an opinion, . . . the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted." *Forsyth County*, 112 S.Ct. at 2401-2 (internal quotations and citations omitted).

Deciding whether the forfeiture of an enterprise serves a "significant prosecutive interest" or will be "proportionate" to the crimes committed invites prosecutors to use their own *subjective* standards regarding the gravity of the offenses committed and the societal value of the enterprise involved. Thus, prosecutors could decide that obscenity-predicated RICO forfeiture is appropriate in a case involving an adult bookstore because they believe (1) inoffensive erotic books have no social value; (2) constitutionally protected erotic books cause moral or other harms; or (3) ridding the community of constitutionally protected sexually oriented materials will improve "moral" standards. At the same time, using subjective values, prosecutors could decide the same remedy to be inappropriate in a case involving a general bookstore that happened to sell seven books that a jury later found to be obscene.[26] Alternatively, in an effort to drive erotica out

ing forfeiture of 12 businesses doing $2 million annually based on $105.30 worth of sales and rentals of items found obscene).

[26] The government might, for example, prosecute the Cincinnati museum under obscenity laws for displaying Robert Mapplethorpe's works, but not bring RICO charges that would result in forfeiture of the balance of the museum's collection and the museum itself, yet seek forfeiture when an adult bookstore sold the same items.

of "mainstream" outlets and restrict them to adult districts, prosecutors could choose to invoke RICO forfeiture against the general bookstore but *not* against adult businesses;[27] or they could use the weapon of forfeiture to target protected erotic materials expressing a disfavored view of the relationship between the sexes or human sexuality. *See American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986). The point is that RICO confers on government officials an extraordinary opportunity to "discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988). Indeed, the "standards" the government has adopted—which are tied to the effectiveness of RICO forfeiture in eradicating the "criminal enterprise"—affirmatively encourage such discrimination.[28]

In this way, the RICO forfeiture scheme works like a licensing system: in deciding whether to seek RICO forfeiture, the prosecutor effectively determines whether a speech enterprise will be permitted to speak in the future. This Court has "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit" necessary for the exercise of free expression. *Kunz v. New York*, 340 U.S. 290, 294

[27] It is notable, for example, that most of the "adult" videos are disseminated in this country by retailers whose main body of inventory is general material.

[28] This Court cannot merely presume that prosecutors will act in good faith and refrain from engaging in censorship of constitutionally protected, albeit officially-disfavored material. *See Lakewood*, 486 U.S. at 770 (the presumption that the mayor will act in good faith "is the very presumption that the doctrine forbidding unbridled discretion disallows"). Moreover, whether prosecutors in fact apply legitimate, content-neutral standards in making their decisions in some cases is irrelevant. *See Forsyth County*, 112 S.Ct. 2403 & n.10. The *potential* for censorship and content-based discrimination alone renders the statute invalid. *Id.*

(1951).[29] Even though such statutes may be facially neutral, the vague, broad standards contained within the statutes invite selective enforcement and censorship of unpopular views. *Lakewood*, 486 U.S. at 757; *Cox v. Louisiana*, 379 U.S. 536, 555-57 (1965). These cases establish the fundamental principle that "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 112 S.Ct. at 2403.

The RICO scheme also presents the defects inherent in an unconstitutionally vague law. Due to the lack of restraints in its application, police and prosecutors may use it to suppress disfavored protected speech and unpopular points of view.[30]

In *Fort Wayne Books*, Justice Stevens recognized the obvious danger of censorship inherent in post-conviction RICO forfeiture, observing that "the longstanding justification for suppressing obscene materials has been to prevent people from having immoral thoughts." 109 S.Ct. at 936 (footnote omitted). "Sexually explicit books and movies . . . are commodities the State does want to exterminate." *Id.* at 939. He concluded that "the Federal RICO law . . . furnishes prosecutors with 'drastic methods' for curtailing undesired activity." *Id.* at 937.

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[29] *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-226 (1990) (holding that licensing scheme for sexually oriented businesses violated the First Amendment); *Lakewood*, 486 U.S. at 763 (striking down a newsrack permit system which placed discretion in the mayor); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969) (striking down a permit scheme for parades or processions); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) (striking down a permit scheme for solicitation of members for organizations).

[30] *See, e.g., Kolender v. Lawson*, 461 U.S. at 360; *Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (holding that vague "breach of the peace" statutes violate the First Amendment because they "leav[e] to the executive and judicial branches too wide a discretion in its application").

> [RICO] allow[s] prosecutors to cast wide nets and seize, upon a showing that two obscene materials have been sold, or even just exhibited, all a store's books, magazines, films, and videotapes—the obscene, those nonobscene yet sexually explicit, even those devoid of sexual reference.

Id. Thus, RICO forfeiture permits prosecutors "to silence immoral speech and repress immoral thoughts," without regard to whether the materials suppressed are protected or unprotected. *Id.* at 938.[31] *See also FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. at 619 (Scalia, J., concurring and dissenting). RICO forfeiture is unconstitutional because it "arm[s] prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use." *Fort Wayne Books*, 489 U.S. at 939 (Stevens, J., concurring and dissenting).[32]

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[31] Justice Stevens concluded that the purpose and effect of Indiana's parallel RICO statute was "to expand beyond traditional prosecution of legally obscene materials that, though constitutionally protected, have the same undesired effect on the community's morals as those that are actually obscene." *Id.* at 938. The Attorney General's Commission on Pornography—the same body that advocated use of RICO forfeiture in obscenity cases—clearly viewed as "harmful" not only obscenity but also "much material that may not be legally obscene, and . . . that would not generally be considered 'pornographic.'" 1 Report at 302.

[32] *Cf. FW/PBS*, 110 S. Ct. at 619 (RICO's "draconian sanctions for obscenity" create great risks for all who would "flirt with the sale of pornography") (Scalia, J., concurring and dissenting).

CONCLUSION

For the foregoing reasons, the decison of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted.

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